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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1965

JAMES HOWELL SMITH and MARVIN SMITH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
Reports of the Opinions Below	1 (Appendix "A")
Jurisdictional Basis for Petition	2-3
Statement of Questions Presented	3-4
Constitutional or Statutory Provisions	4
Statement of Facts	4-8
Basis of Federal Jurisdiction	8
Reasons for Allowance of Writ	9-11
Conclusion	12

APPENDIX

Appendix "A"—Reports of the Opinions Below	13

Page

TABLE OF AUTHORITIES

A. Case Law

Arellanes v. United States, 302 F.2d 602 11
Byrnes v. United States, 327 F.2d 825 10
Collis v. United States, 247 F.2d 566 11
Escobedo v. Illinois, 378 U.S. 478 ..... 9, 10
France v. United States, 164 U.S. 676 11
Gideon v. Wainwright, 372 U.S. 335 9
Gordon v. United States, 344 U.S. 414 11
Gutierrez v. United States, 314 F.2d 334 11
Henry v. United States, 361 U.S. 98 9
Jackson v. United States, 250 F.2d 772 11
McNabb v. United States, 318 U.S. 332 9
Macaboy v. United States, 160 F.2d 279 11
Mallory v. United States, 354 U.S. 449 9
Meeks v. United States, 163 F.2d 598 11
Morrison v. California, 291 U.S. 82 10
People v. Mangi, 176 N.E.2d 86 11
Recan v. United States, 183 F.2d 293 10
Wong Sun v. United States, 371 U.S. 471 9
Young v. United States, 48 F.2d 26 10
United States v. Curry, 227 F. Supp. 773 9
United States v. Goldsmith, 277 F.2d 335 9
United States v. Hogan, 232 F.2d 905 11
United States v. Masino, 275 F.2d 129 11
United States v. Migliorino, 238 F.2d 7 11
United States v. Mills, 293 F.2d 609 11

B. Statutes

Title 18, United States Code, Federal Rules of Criminal Procedure, Rule 5(c) 4
Title 21, United States Code, Section 174 ..... 7, 9
Title 26, United States Code, Section 4704(a) ... 7, 9
Title 26, United States Code, Section 4705(a) ... 7, 9
Title 28, United States Code, Section 1254 3

C. Miscellaneous

72 Harv. L. Rev. 920 10

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

This petition prays that writs of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, in case number 15507 of that Court, decided and entered of record in the above-entitled case on April 7, 1965.

REPORTS OF THE OPINIONS BELOW

This Court is respectfully referred to the contents of Appendix "A" of this petition, where the unofficial report

of the opinion of the United States Court of Appeals for the Sixth Circuit in this case is reprinted verbatim. There were no other opinions or reports written or issued by the Courts below.

JURISDICTIONAL BASIS FOR PETITION

On April 7, 1965, the United States Circuit Court of Appeals for the Sixth Circuit, in case number 15507, affirmed the judgment of the trial court, which, in case number 10433, criminal docket of the United States District Court for the Southern District of Ohio, Western Division, had found both defendant-petitioners guilty of violating various Federal narcotics laws set forth below. The decision of affirmance by the United States Circuit Court of Appeals for the Sixth Circuit was entered on the same date. No application was made by either petitioner for a re-hearing by that Court.

Thereafter, the same Court issued a Mandate to the United States District Court which directed that the defendants be apprehended by the United States Marshall. Prior to the issuance of this Mandate, however, petitioners sought for and obtained from this Court, pursuant to timely application, an extension of time within which to file this petition. The order granting a thirty day extension for filing, granting time to and through June 5, 1965, was signed by the Honorable Potter Stewart, Associate Justice of the Supreme Court of the United States, and was dated May 4, 1965.

Believing that the petitioners' Constitutional rights were violated in various ways during the course of the trial in the United States District Court, and having obtained no recourse in the United States Circuit Court of Appeals for the Sixth Circuit, federal jurisdiction having been invoked by their arrest, indictment and prosecution, this

petition is founded on the provisions of Title 28, United States Code § 1254.

STATEMENT OF QUESTIONS PRESENTED

(1) Where, after persons (that is, petitioners here) are arrested for violating Federal laws and on the same day are brought before a United States Commissioner for the setting of bond, and arrangements are made with the United States Attorney and the Commissioner for a date for a preliminary hearing on the charges, and thereafter the United States Attorney, without notice to defense counsel, takes the evidence, including key testimony of a Government informer, to a Federal Grand Jury and obtains various indictments against these persons, and they are subsequently denied requests for preliminary hearings, are their Constitutional rights violated under the Fifth, Sixth and Fourteenth Amendments?

(2) Does a Federal District Court Judge commit prejudicial and reversible error in admitting into evidence, over the objections of the defense, testimony concerning the acts and statements of one defendant, made in the absence of the other defendant, where the indictments lodged against both defendants do not charge or allege a conspiracy to violate Federal laws?

(3) Is the uncorroborated testimony of a Government informant as to the possession and sale of narcotics by a defendant, sufficient evidence to support and sustain a conviction in the absence of any other admissible evidence on the issues of narcotics sales and possession?

(4) Did the trial court commit prejudicial error in refusing to grant the defendants a new trial upon evidence that the key Government witness, an informant, had received special considerations from police authorities not only as to reduction in bonds, which bond was posted by

a Federal officer and witness at the trial, but also as to the amount and extent of penalty imposed for violations of criminal laws of a state?

CONSTITUTIONAL OR STATUTORY PROVISIONS INVOLVED HEREIN

Petitioners believe that their rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution were violated before, during, and after the trial of this cause, and, in addition, believe that the Courts misconstrued the true meaning and essence of the Federal Rules of Criminal Procedure, Title 18, United States Code, Rule 5 (c).

STATEMENT OF FACTS

The petitioners, appellant-defendants in the Court below, were arrested by Federal authorities on March 8, 1963, and were arraigned on the same day. A preliminary hearing was scheduled for March 29, 1963, and petitioners were released on bond. While awaiting the preliminary hearing, the petitioners were jointly indicted by a Federal Grand Jury for illegal possession, sale, and sale without a written order of certain drugs. Thereafter the defendants demanded, but were refused, the right to a preliminary hearing.

Subsequently petitioners filed motions to quash the indictments. When these motions were overruled, pleas of not guilty were entered. Both defendant-petitioners were tried jointly by a jury in the United States District Court and were convicted. Motions for a new trial were overruled and an appeal was instituted.

The factual development of this case began in February, 1963, when one Jack Cohen, alias Dave Mullins, was arrested by the Narcotics Bureau of the Cincinnati, Ohio,

Police Department and was taken to a police station for questioning. Shortly thereafter one Detective Robisch of the Cincinnati Police called in a Federal Narcotics Agent, Mr. Augustine A. Ginetz. When Agent Ginetz arrived at the Police Station he talked to Cohen. Although Cohen at the time had a record showing three convictions for narcotics law violations and had been an admitted user of narcotics for roughly ten years, he was not charged with any Federal narcotics law violation.

During the course of the conversation at the Police Station, Cohen apparently made a proposition to Agent Ginetz. Although at the trial Agent Ginetz testified that some agreement had been reached between the two of them under which Cohen would receive some "benefit", he denied accepting any deal proposed by Cohen.

Thereafter, around February 23rd or 24th, 1963, Cohen, at the request of Agent Ginetz, went to the latter's offices. A day or so later, on February 25th, Agent Ginetz, from his offices and in the presence of Cohen, attempted to dial a local number, allegedly the home of one of the petitioners, James Smith. Agent Ginetz dialed all but the last digit of the number. Cohen dialed the last number. Defense counsel objected to testimony relating to the alleged conversation which transpired. Although the record does not indicate that the petitioner, James Smith, was present or knew of the conversation or transaction, this testimony was admitted into evidence.

Cohen testified that he knew the telephone number of James Smith because of previous and prior transactions between the two of them. He stated that he had met James Smith in the latter part of 1962, and, over the objection of defense counsel, was permitted to describe these transactions in detail. Cohen's testimony on this subject was totally uncorroborated. And there was no evidence presented at any time during the trial that the

co-defendant, one of the petitioners herein, knew either James Smith or the Government informer, Jack Cohen. Indeed, Cohen himself testified that the first time he met Marvin Smith was in late February, 1963.

After the phone call to James Smith of February 25th, had been made and arrangements for a sale were allegedly agreed to, Agent Ginetz searched both Cohen's person and automobile. Later, in the presence of other police officers, the car was again searched. Before Cohen left to meet James Smith, Agent Ginetz secreted himself in the trunk of Cohen's car. Cohen then met James Smith and a conversation relating to narcotics took place in the car. The name of Marvin Smith was used during the conversation. Marvin Smith was not present.

Over defense objection, the Court permitted both Cohen and Ginetz to testify as to the conversation held, out of the presence of Marvin Smith, between Cohen and James Smith.

After narcotics were allegedly purchased from James Smith, Cohen and the former went to an apartment in Cincinnati, Ohio, where some of the narcotics were used. Marvin Smith was in the apartment, along with several other people. The only admissible testimony relating Marvin Smith in any way to the supposed possession and sale of narcotics was the vague and uncorroborated testimony of Cohen that James Smith had exchanged monies with Marvin Smith while he was in the apartment.

On March 1, 1963, after similar arrangements had been made by Cohen with James Smith under Federal supervision, an alleged sale transpired in a Cincinnati suburb between James Smith and Cohen. Although Marvin Smith was not present at the time of the supposed sale and was only vaguely connected with it by the fact that Cohen saw Marvin Smith later that evening with James Smith, the Court again, over objection, admitted prejudicial hearsay

testimony as to the transactions and conversations between James Smith and Cohen.

Another identical factual pattern transpired on March 8, 1963, and evidence as to the occurrences was again admitted, over objection. No charges were ever brought regarding this latter event, yet the Court permitted the testimony to go to the jury.

At the trial no money was introduced in evidence to substantiate any purchase of narcotics. The co-defendants were never charged by the Federal Grand Jury with the crime of conspiracy nor was there any proof in the record of this case to support such an allegation.

A Federal jury, duly impaneled and sworn, convicted the petitioners of two separate violations of the following Federal laws: Section 174, Title 21, United States Code; Section 4704(a), Title 26, United States Code; and Section 4705(a), Title 26, United States Code. Petitioner James Smith was given a sentence totalling seven years; petitioner Marvin Smith, ten years.

A motion for new trial, based on newly discovered evidence, was filed in the District Court but was overruled. The testimony adduced at the hearing on the motion for a new trial clearly showed that a deal had been worked out between the Government, by and through Agent Ginetz, and the informer, Jack Cohen, which deal had been denied at the trial so that the jury hearing and deciding the matter was not apprised of the "interest" of the key Government witness in the outcome of the litigation, to wit: (a) After the arrest of Cohen in February, 1963, and his conversation with Ginetz, the former was charged in an Ohio Court with receiving narcotics by members of the Cincinnati Narcotics Bureau, headed by Detective Robisch. Despite Cohen's long criminal record and his admitted use of narcotics, he was released from state custody on his own recognizance; (b) later a Federal Narcotics

Agent made it possible for Cohen to obtain admission into the Rollman State Hospital in Cincinnati, a mental institution. While Cohen was in Rollman's he stole a doctor's bag which contained narcotics; (c) Cohen was then indicted by a state Grand Jury on another narcotics charge and bond was set at two thousand dollars. Immediately after he testified for the Federal Government in this case his bond in the state case was mysteriously reduced from two thousand dollars to two hundred and twenty-five dollars and Agent Ginetz himself posted cash bond in that amount. Agent Ginetz testified that he had heard an Assistant United States Attorney make arrangements over the telephone either with a state Judge or Prosecutor, for the reduction in bond; and (d) after the conviction of the petitioners Ginetz admitted discussing the possibility of getting probation for Cohen in the state case with a named state Prosecutor. And, in fact, Cohen, despite his long criminal record, was given probation.

The jury in the instant case was totally unaware of these facts and circumstances which clearly point out the interest and bias of the chief Government witness. Indeed, at the trial, both Ginetz and Cohen steadfastly denied any "deal", thus giving the impression to the jury that all was well and above-board.

BASIS OF FEDERAL JURISDICTION

The United States District Court for the Southern District of Ohio, Western Division, had initial jurisdiction over the petitioners by virtue of Federal criminal prosecutions lodged therein by the United States Attorney for alleged violations of Section 4704(a) and 4705(a), Title 26, United States Code, and Section 174, Title 21, United States Code.

REASONS FOR ALLOWANCE OF WRIT

The United States Court of Appeals for the Sixth Circuit ruled in the instant case that petitioners were not denied due process of law when the United States Attorney, despite prior arrangements for a date for a preliminary hearing, obtained Federal Grand Jury indictments against the appellants. While it must be conceded that there is some authority for this ruling by lower Federal Courts, it is urged that this Court thoroughly review this procedural point of law by a hearing on the merits.

Since this Court has already decreed that the due process clause of the Fifth Amendment was applicable to the functioning of the Federal Rules of Criminal Procedure with respect to speedy arraignments before United States Commissioners in the oft-cited *McNabb* v. *United States,* 318 U.S. 332 and *Mallory* v. *United States,* 354 U.S. 449 cases, it follows logically that the fundamentals of fair play would require, upon demand and in the absence of express waiver by an accused, a preliminary hearing in a Federal felony case.

In Federal criminal prosecutions this Court has expressed great concern about the "probable cause" requirements of arrest, *i.e., Henry* v. *United States,* 361 U.S. 98; *Wong Sun* v. *United States,* 371 U.S. 471. It is submitted, in view of the ever-growing body of case law recognizing the rights of a person between arrest and trial, *i.e., Escobedo* v. *Illinois,* 378 U.S. 478, and *Gideon* v. *Wainwright,* 372 U.S. 335, that similar protection be afforded to one charged with a violation of Federal criminal law who requests a preliminary hearing. *United States* v. *Goldsmith,* 277 F.2d 335; *United States* v. *Curry,* 227 F. Supp. 773.

The Federal Courts which have held that the due process clause ramifications do not attach to Federal preliminary hearings state that the primary function of such a hearing

is to hold the defendant for determination of bond. See, *i.e., Byrnes* v. *United States,* 327 F.2d 825. Surely such a view ignores the fact that the defendant has the right to learn, as quickly as possible, of the nature of the cause against him and to have a duly qualified magistrate or commissioner, who hears both sides of a matter, determine if he should be held for Grand Jury consideration.

If this Court denies this application for a Writ it would mean that an accused has no right to learn of the nature of the charges and the supposed factual basis therefor until, at the earliest, upon indictment, or at the latest, when tried, thus depriving him of the opportunity to test the "probable cause" for his arrest. It would permit, perhaps in many instances, the evils which this Court has sought to correct by it's ruling in the *Escobedo* case.

For these reasons this Court should issue a writ on the first question presented.

The petitioner, Marvin Smith, contends that his rights to a fair and impartial trial, as guaranteed to him under the United States Constitution in the Fifth and Fourteenth Amendments, were violated when the Court, against strong and continuing defense objections, permitted hearsay evidence to go to the jury which, under only proper circumstances, *i.e.,* where co-defendants are charged with a conspiracy to violate Federal law, would be admissible.

The co-defendants in this case were not charged with conspiracy, nor was there any effort made by the Government to make out such a case. See: *Morrison* v. *California,* 291 U.S. 82; 72 *Harv. L. Rev.* 920; *Young* v. *United States,* 48 F.2d 26; *Recan* v. *United States,* 183 F.2d 293.

Petitioners contend that there was insufficient evidence in this case, particularly against the defendant, Marvin Smith, of possession and sale of narcotics, that the United States Court of Appeals for the Sixth Circuit erred in affirming the trial court's refusal to direct a verdict of ac-

quittal to that defendant, and that a writ should be allowed because the ruling of the Court below conflicts with the findings and rulings of Courts in other Circuits.

The Court is respectfully referred to the following authorities: *Jackson* v. *United States,* 250 F.2d 772; *United States* v. *Mills,* 293 F.2d 609; *Arellanes* v. *United States,* 302 F.2d 603; *Macaboy* v. *United States,* 160 F.2d 279; *Gutierrez* v. *United States,* 314 F.2d 334; *Gollis* v. *United States,* 247 F.2d 566. The decided weight of authority in this country is that it is the duty of the trial court to direct an acquittal where there is no substantial evidence of the guilt of the accused. *France* v. *United States,* 164 U.S. 676.

Finally, respectfully submitted, is the contention of petitioners that the trial court committed prejudicial error in refusing to grant a new trial, when, after trial, it was discovered that various arrangements had been made by Federal Agents to reduce and post bond for the Government informer, as well as Government negotiations to procure probation on a narcotics charge for a man already three times convicted for the same or similar offenses.

The jury should have been, in all fairness to the defendants, apprised of these facts in order to properly assess his interest as an informant and as a Government witness. Any defendant is entitled to a fair trial and promises made to an accomplice must be made known to both the Court and jury. *People* v. *Mangi,* 176 N.E.2d 86.

Since a number of Federal Courts have held that exclusion of such information of bias or prejudice of a Government witness would constitute reversible error, it follows that when a Court learns of these facts by way of a motion for new trial, fair play would dictate the granting thereof. See: *Gordon* v. *United States,* 344 U.S. 414; *United States* v. *Masino,* 275 F.2d 129; *United States* v. *Hogan,* 232 F.2d 905; *United States* v. *Migliorino,* 238 F.2d 7; *Meeks* v. *United States,* 163 F.2d 598.

CONCLUSION

For the above-mentioned reasons, the petitioners pray that this Court will issue writs of certiorari to the United States Court of Appeals for the Sixth Circuit in this cause.

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APPENDIX "A"

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
CASE NO. 15507
(Decided April 7, 1965.)

Before: MILLER, CECIL and EDWARDS, Circuit Judges.

CECIL, Circuit Judge. This is an appeal by defendants-appellants, James Smith and Marvin Smith, from a conviction in the United States District Court for the Southern District of Ohio on all counts of a six-count joint indictment charging possession and sale of narcotics in violation of Section 174, Title 21, U.S.C. and Sections 4704(a) and 4705(a) of Title 26, U.S.C. It is alleged in the indictment that the first three counts grew out of a transaction on February 25, 1963, and that the transaction, upon which counts four, five and six were based, occurred on March 1, 1963. The appellants were tried jointly to a jury but they have filed separate briefs on this appeal.

The charges are based on sales of heroin to Jack Cohen, a government informer, on the dates above mentioned. On each occasion, Jack Cohen made a contact with James Smith by telephone and by appointment met him and purchased the heroin. Prior to the purchase Cohen was searched by officers and given money with which to make the purchase. Special Agent Ginetz rode in the trunk of Cohen's car and heard the conversations, at the time of the transactions, between Cohen and James Smith.

On February 25th, James Smith entered Cohen's car and it was agreed that James Smith would sell him one-half of a "spoon" of heroin for $60. Officers Mulligan and Robish, of the Cincinnati Police Department, saw James Smith enter Cohen's car. Cohen and James Smith drove

to Greenwood Avenue, in Cincinnati, and entered a second-floor apartment. A man named Steve and the appellant Marvin Smith were in the apartment.

Steve left the presence of the other persons and while he was gone, Marvin Smith produced some cocaine which was used by Cohen, and James and Marvin Smith. Steve returned with a hypodermic needle. Marvin Smith stepped out of the apartment and returned with a couple of "caps" of heroin and handed them to James Smith. Cohen and James Smith both used some of the heroin and Cohen stated that he would buy some. The two then left in Cohen's car for Lincoln Heights, Ohio, to get some heroin. James Smith dropped Cohen off, drove away and then returned and picked up Cohen. In the car James Smith handed Cohen a package of heroin and Cohen gave him the money. They returned to the apartment where they found Marvin Smith. Cohen and James Smith each took an injection of heroin. James Smith and Marvin Smith excused themselves and went into an adjoining room where Cohen could see money passing between them. Between February 25th and March 1st, Cohen obtained three more capsules from Marvin Smith.

On March 1st virtually the same procedure was followed. James Smith entered Cohen's car at Smith's Alaska Avenue apartment. They drove to Lincoln Heights and parked in front of a night club. There they met Marvin Smith. Cohen went into a drugstore to purchase a hypodermic needle. While he was gone, James and Marvin Smith carried on a conversation which Ginetz could hear. The subject of the conversation was narcotics. James Smith said that they should see Cohen take an injection, on the theory that police do not use narcotics. Marvin Smith said he had a whole box of "nails", that is, hypodermic needles. James Smith then went into the drugstore and gave Cohen a package of heroin. Cohen had previously

given James Smith $75 in the car. They then drove to a house on McIntire Street. After they went into the house Marvin Smith stepped outside and returned with a package of hypodermic needles. James Smith and Cohen took injections of heroin.

The principal assignment of error on behalf of Marvin Smith relates to the admission into evidence of conversations between James Smith and Cohen, not in the presence of Marvin Smith, which involved Marvin Smith in the narcotics traffic. It is contended that testimony of criminal acts and conversations by and between James Smith and Cohen not in the presence of Marvin Smith, but involving him, could not be admitted in evidence in the absence of a conspiracy. No conspiracy was charged in this case.

The evidence detailed above in connection with the transactions of February 25th and March 1st show at least that Marvin Smith was an aider and abetter, if not a full fledged principal. The trial judge properly instructed the jury on aiding and abetting.

We are of the opinion that the evidence, exclusive of the testimony to which objection is made, is sufficient to warrant the jury in finding that James and Marvin Smith were engaged in a joint venture of selling narcotics. This being true, the conversations between James Smith and Cohen and their acts in furtherance of the joint venture were admissible.

In *United States* v. *Pugliese*, 153 F.2d 497 (CCA 2 1945), the defendant was convicted of possessing distilled spirits without having revenue stamps affixed thereto. No conspiracy was charged in the indictment. Certain declarations made by the defendant's wife were admitted into evidence. The Court said at page 500:

> "The last point is the judge's refusal to direct the jury not to use against Pugliese the declarations of

his wife to the policeman. The fact that the couple was not indicted for conspiracy, was irrelevant in determining the competency against him of any thing she might say. *American Fur Company* v. *United States,* 2 Pet. 358, 365, 7 L.Ed. 450; *Tuckerman* v. *United States,* 6 Cir., 291 F. 958, 970; *Gooch* v. *United States,* 10 Cir., 82 F.2d 534, 536, 537. That depended upon whether what she said was a step in a venture to which both were parties. If it was, it was admissible in any prosecution or in any civil action; if it was not, it was as incompetent in a prosecution for conspiracy as anywhere else, although it appears impossible to disabuse prosecutors of the contrary belief. As we said in *Van Riper* v. *United States,* 13 F.2d 961, 967: 'When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made "a partnership in crime." What one does pursuant to their common purpose, all do, and, as declarations may be such acts, they are competent against all.' "

See also, *United States* v. *Annunziato,* 293 F.2d 373, C.A. 2; *Williams* v. *United States,* 289 F.2d 598, C.A. 9; and *Fuentes* v. *United States,* 283 F.2d 537, C.A. 9.

Other claims made on behalf of Marvin Smith concerning the quantum of testimony required to take the case to the jury and to sustain a guilty verdict are without merit. In considering a motion of a defendant for acquittal, the trial judge must consider the evidence in the light most favorable to the United States. *United States* v. *Grimes,* 332 F.2d 1014, 1016, C.A. 6; *United States* v. *Decker,* 304 F.2d 702, 705, C.A. 6; *United States* v. *Berkley,* 288 F.2d 713, 716, C.A. 6; *Battjes* v. *United States,* 172 F.2d 1, 5, C.A. 6. There was ample direct evidence against Marvin Smith to warrant the jury's verdict of guilty.

Finally, it is argued on behalf of Marvin Smith that his conviction cannot stand without the testimony of informer

Cohen, and that Cohen's testimony should not be accepted because he was a disreputable narcotic violator and was promised benefits for his cooperation. This Court has held in numerous cases that the character of an informer does not disqualify him as a witness but his character may be considered in relation to his credibility. *United States* v. *Baxter*, . . . F.2d . . .; *United States* v. *Cooper*, 321 F.2d 456, 458; and *United States* v. *Walker*, 320 F.2d 472, 475, cert. den. 375 U.S. 934. See also, *Puentes* v. *United States*, 319 F.2d 581, 582, C.A. 5; *United States* v. *Countryman*, 311 F. 2d 189, 191, C.A. 2; and *United States* v. *Vittoria*, 284 F.2d 451, 454, C.A. 7.

Several questions pertaining to the admission of evidence are argued on behalf of the appeal of James Smith. These are all without merit. Evidence of a similar nature has been previously admitted in narcotics cases and upheld by this Court. Likewise, it has been held that the use of an informer, as Cohen was used in this case, does not constitute entrapment. *Sherman* v. *United States*, 356 U.S. 369; *United States* v. *Baxter*, . . . F.2d . . ., C.A. 6; *Haynes* v. *United States*, 319 F.2d 620, C.A. 5; *United States* v. *Lile*, 290 F.2d 225, C.A. 6; *United States* v. *Lauer*, 287 F.2d 633, C.A. 7; and *Walker* v. *United States*, 285 F.2d 52, C.A. 5.

Another assignment of error is that the appellant James Smith was denied due process of law because he was indicted by the Grand Jury without having a preliminary hearing. This question has also been passed upon by this Court. We have held that a preliminary hearing is not essential to due process of law. See *Dillard* v. *Bomar*, . . . F.2d . . ., and cases cited therein. See also, *United States ex rel. Kassin* v. *Mulligan*, 295 U.S. 396, 400, and *Goldsby* v. *United States*, 160 U.S. 70, 73.

The judgment of the District Court is affirmed as to both appellants.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 220

JAMES HOWELL SMITH AND MARVIN SMITH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. V) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1965 (R. V). On May 4, 1965, Mr. Justice Stewart extended the time for filing petitions for writs of certiorari to and including June 5, 1965, and the joint petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were entitled to a preliminary hearing when an indictment intervened before the date set for the hearing.

780-361—65

2. Whether statements in furtherance of a joint venture made out of the presence of petitioner Marvin Smith were properly admitted against him.

3. Whether the evidence was sufficient to support petitioners' convictions.

4. Whether the trial court properly denied a motion for a new trial based on alleged newly discovered evidence relating to the credibility of a government informer.

STATEMENT

Petitioners were charged in an indictment in six counts returned in the United States District Court for the Southern District of Ohio with the sale of heroin on February 25, 1963, and March 1, 1963 (R. I, 1). The jury found petitioners guilty on all six counts (R. I, 9, 10). James Smith was sentenced to imprisonment for seven years and Marvin Smith for ten years (R. I, 12, 13). On appeal (R. I, 15), the convictions were affirmed. The evidence may be summarized as follows:

On February 25, 1963 (counts 1, 2, 3), from the office of narcotics agent Ginetz, in Cincinnati, Ohio, Cohen, a government informer,[1] telephonically arranged a meeting with petitioner James Smith to purchase narcotics. Cohen and his car were searched by officers; he was given $60 to make the purchase,

[1] Cohen admitted that he was a narcotics user and had prior convictions for State and federal narcotics offenses (R. IV, 3–4). He had purchased heroin from James Smith on about five occasions in 1962 and early 1963 (R. IV, 5–7, 10–12).

and he then drove to James Smith's apartment with agent Ginetz hidden in the trunk of the car (R. IV, 12–13, 15–16, 104–109; R. III, 3–4, 20–21). When James Smith entered Cohen's car, he offered to sell a half spoon of heroin for $60, and Cohen agreed (R. IV, 17, 113–114). Cohen and James Smith drove to a second-floor apartment on Greenwood Avenue where Marvin Smith and a man named Steve were present (R. IV, 18, 115). While Steve left to obtain hypodermic needles, James Smith, Marvin Smith and Cohen all inhaled some of James Smith's cocaine (R. IV, 21–22). When Steve appeared with the needles, Marvin Smith went out and returned with several caps of heroin which he handed to James Smith. Cohen and James Smith both took injections of the heroin. Cohen said he liked it and would buy some (R. IV, 22).

Cohen and James Smith left in Cohen's car for Lincoln Heights, Ohio, to obtain heroin. During the trip, James Smith said that he and Marvin Smith had plans to become the largest dealers in the area and were going to take over the entire narcotic traffic in southern Ohio (R. IV, 23, 116).[2] James Smith then borrowed Cohen's car and drove away. He picked up Cohen again about 10 minutes later. In the car James Smith gave Cohen a package of heroin for which Cohen paid him $60 (R. IV, 24, 118–119). There were no Internal Revenue stamps on the package and no written order form for the sale (R. IV, 24–25). The two men returned to the Greenwood

[2] Both Cohen and agent Ginetz were permitted to testify to these statements over defense objection.

apartment where they found Marvin Smith. Cohen and Steve then took heroin injections (R. IV, 25–26, 120). Petitioners James Smith and Marvin Smith excused themselves to talk business in the kitchen, and Cohen saw money passing between them. After Cohen drove away from the apartment, he opened the trunk and gave the package of heroin to Ginetz (R. IV, 27).

On March 1, 1963 (counts 4, 5, 6), a similar procedure was followed, and Ginetz again hid in the car trunk (R. IV, 28–29, 125–126; R. III, 6–7, 22–23). James Smith and Cohen parked in front of a nightclub at Lincoln Heights where they met Marvin Smith (R. IV, 29). Ginetz again heard James Smith say that he and his partner, Marvin Smith, were going to take over the entire narcotic business in southern Ohio (R. IV, 128). Cohen went into a drugstore to buy a hypodermic needle (R. IV, 29). While Cohen was gone, Ginetz overheard James Smith tell Marvin Smith that they should watch Cohen "hit" (take a narcotics injection) on the theory that police do not use narcotics. Marvin Smith said that he had a whole boxful of "nails" (hypodermic needles) (R. IV, 130–132). James Smith then went into the drugstore and told Cohen that he did not need any needles. He gave Cohen a package of unstamped heroin, for which there was no order form and for which Cohen had previously paid him $75 (R. IV, 30–31). Upon getting into the car, James Smith said to Cohen, "Follow my man [Marvin Smith]." They then drove to a house on McIntyre Street (R. IV, 132, 31). Marvin Smith went outside and returned with a package of hypo-

dermic needles, after which Cohen and James Smith took injections of heroin (R. IV, 31–32). After Cohen drove away, he opened the trunk and gave the package of heroin to Ginetz (R. IV, 32–33, 133–134).

On March 8, 1963, a similar pattern of conduct occurred at the house on McIntyre Street where Cohen and James Smith took injections of heroin (R. IV, 33–36, 136–139; R. III, 8–12, 25–28, 30–36). Marvin Smith complained of "heat" all over the neighborhood and asked Cohen for the return of a package of heroin. Cohen gave the heroin to Marvin Smith and recovered his purchase money from James Smith (R. IV, 36). Upon hearing a knock at the door Marvin Smith said, "That's the heat", grabbed the package, and went into the bathroom. Cohen then heard the toilet flush (R. IV, 38).

ARGUMENT

1. Petitioners were arrested and brought before a commissioner on March 8, 1963, and a preliminary hearing was scheduled for March 29, 1963. No hearing was held, since petitioners' indictment was returned on March 15, 1963 (R. I, 1). The failure to hold a preliminary hearing after indictment was not error. Petitioners knew the general nature of the charges when they were first arrested, and they learned the specific accusation when the indictment was returned approximately one week thereafter. The Federal Rules of Criminal Procedure do not contemplate a preliminary hearing *after* the return of an indictment. Since the principal purpose of a preliminary

examination under Rule 5(c), F.R. Crim. P., is to determine whether there is sufficient evidence against an accused to warrant his being held for action by a grand jury, such a hearing is superfluous after an indictment has been returned. At that time, it is established that the grand jury has found probable cause to accuse the defendant. *Barber* v. *United States*, 142 F. 2d 805, 807 (C.A. 4), certiorari denied, 322 U.S. 741. See, also, *United States ex rel. Kassin* v. *Mulligan*, 295 U.S. 396, 400; *Byrnes* v. *United States*, 327 F. 2d 825, 834 (C.A. 9), certiorari denied, 377 U.S. 970; *Barrett* v. *United States*, 270 F. 2d 772, 775–776 (C.A. 8).[3]

2. There was no error in admitting into evidence against petitioner Marvin Smith conversations between James Smith and Cohen regarding Marvin Smith's involvement in the narcotics traffic. Even though no conspiracy was charged, the evidence showed that both petitioners were concertedly engaged in selling narcotics. The challenged declarations by James Smith were in furtherance of that joint venture since they were designed to assure Cohen—who was believed to be a customer—that the source of supply would continue. As such, the declarations were admissible against an absent joint venturer such as Marvin Smith. *United States* v. *Pugliese*, 153 F. 2d 497, 500

[3] The Court of Appeals for the District of Columbia has, it is true, suggested a procedure whereby a defendant's right to a preliminary hearing before indictment is made secure, but that court refused to reverse a conviction where the preliminary hearing had not been held. *Blue* v. *United States*, 342 F. 2d 894. Petitioners in this case did not seek to have the hearing held earlier than March 15.

(C.A. 2); *Fuentes* v. *United States*, 283 F. 2d 537, 539–540 (C.A. 9); *Williams* v. *United States*, 289 F. 2d 598, 601–602 (C.A. 9); *United States* v. *Annunziato*, 293 F. 2d 373 (C.A. 2), certiorari denied, 368 U.S. 919.

3. The evidence was sufficient to support petitioners' convictions. With respect to James Smith, the testimony of Cohen, corroborated in part by that of agent Ginetz, established that James Smith passed narcotics to Cohen and received money in both sales. As for Marvin Smith, the evidence showed that during the first sale on February 25, 1963, he produced several caps of heroin which Cohen tested prior to deciding upon a purchase; and the jury could reasonably infer that some of the money Cohen saw passing between the two petitioners was what he had paid James Smith for narcotics. On March 1, 1963, Marvin Smith met with Cohen and James Smith just prior to the second sale, and later produced a package of hypodermic needles which Cohen and James Smith used in taking injections. As the court below observed, Marvin Smith was at least "an aider and abetter, if not a full fledged principal" (Pet. 15). See *Nye & Nissen* v. *United States*, 336 U.S. 613, 619; *Pereira* v. *United States*, 347 U.S. 1, 9–11.

4. On February 2, 1964, petitioner James Smith filed a motion for a new trial on the ground of newly discovered evidence (R. III).[4] The court of appeals thereupon ordered the appeal held in abeyance until certification by the trial court as to whether it would grant or deny the motion if the case were remanded

[4] Petitioner Marvin Smith apparently filed a later motion for a new trial similar to that of James Smith.

for a ruling upon it (R. V). On December 8, 1964, the district court entered an order stating, *inter alia* (R. V):

> After a full review of the evidence and authorities, it is our judgment that the so-called newly discovered evidence might at most tend to impeach the credibility of a witness whose testimony was in large measure corroborated, and it is not probable that such evidence would produce an acquittal. * * *
>
> Certification is therefore made that the Motions for a New Trial would not be sustained if the case were remanded.

There is no occasion to review the district court's exercise of discretion in denying the motion.[5] *United States* v. *Johnson,* 327 U.S. 106. Cohen was known to the jury to have worked for the government, and he admitted on cross-examination that he had three previous narcotics convictions and one such pending (R. IV, 44). Since Cohen's testimony was corroborated to a considerable extent by that of agent Ginetz and three Cincinnati policemen who joined in the surveillance, the court properly found that the evidence offered did not warrant a new trial.

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[5] Petitioner has not filed with the record a transcript of the testimony at the hearing on the motion for a new trial. He alleges (Pet. 7–8) that this testimony showed that after Cohen had testified in the instant federal case, agent Ginetz arranged for the reduction in a State case of Cohen's bond from $2,000 to $225, which Ginetz posted; that Ginetz admitted discussing with a State prosecutor the possibility of getting probation for Cohen in the State case; and that Cohen was in fact given probation.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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